

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

**ON APPEAL FROM THE COURT OF APPEALS
THE HONORABLE PATRICK M. METER, THE HONORABLE KAREN M. FORT-
HOOD, AND THE HONORABLE BILL SCHUETTE, PRESIDING**

THE GREATER BIBLE WAY TEMPLE

OF JACKSON, a Michigan ecclesiastical
Corporation,

Plaintiff-Appellee,

v

**CITY OF JACKSON,
JACKSON PLANNING COMMISSION,
and JACKSON CITY COUNCIL,**

Defendants-Appellants.

Supreme Court No.130194

Court of Appeals No. 255966

Trial Court No. 01-003614-AS

**PLAINTIFF'S/APPELLEE'S BRIEF IN RESPONSE
TO DEFENDANTS'/APPELLANTS' BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff-Appellee accepts the Defendants-Appellants' statement of basis of jurisdiction as being correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. DO THE EXTENSIVE PROCEDURES SET FORTH IN THE CITY OF JACKSON'S ZONING ORDINANCE WHICH WERE IMPLEMENTED AND FOLLOWED IN REVIEW OF GREATER BIBLE'S REQUEST FOR REZONING AMOUNT TO AN INDIVIDUALIZED ASSESSMENT WHICH TRIGGERED THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA), 42 USC 2000CC?**

The Plaintiff-Appellee's answer: Yes.

The Defendants-Appellants' answer: No.

The Circuit Court's Answer: Yes.

The Court of Appeals' answer: Yes.

This Court's Answer should be: Yes.

- II. DID GREATER BIBLE SUFFER A SUBSTANTIAL BURDEN TO ON ITS RELIGIOUS EXERCISE WHEN ITS REQUEST FOR REZONING WAS DENIED, PREVENTING IT FROM BUILDING ELDERLY AND DISABLED HOUSING ON ITS OWN PROPERTY WHEN NO OTHER PROPERTY EXISTED IN THE CITY OF JACKSON WHERE GREATER BIBLE COULD BUILD AND ESTABLISH HOUSING FOR THE ELDERLY AND DISABLED IN FURTHERANCE OF ITS RELIGIOUS MISSION?**

The Plaintiff-Appellee's answer: Yes.

The Defendants-Appellants' answer: No.

The Circuit Court's Answer: Yes.

The Court of Appeals' answer: Yes.

This Court's Answer should be: Yes.

III. DO THE CITY OF JACKSON'S ALLEGED AESTHETIC, TRAFFIC AND BLIGHT CONCERNS AMOUNT TO A COMPELLING GOVERNMENTAL INTEREST UNDER RLUIPA SUFFICIENT TO JUSTIFY A SUBSTANTIAL BURDEN ON GREATER BIBLE'S RELIGIOUS EXERCISE TO FURTHER ITS RELIGIOUS MISSION, AND DID THE CITY OF JACKSON MEET ITS BURDEN OF ESTABLISHING THAT IT TOOK THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT GOVERNMENTAL INTEREST?

The Plaintiff-Appellee's answer: No.

The Defendants-Appellants' answer: Yes.

The Circuit Court's Answer: No.

The Court of Appeals' answer: No.

This Court's Answer should be: No.

IV. IS RLUIPA CONSTITUTIONAL IN ITS PROHIBITION AGAINST LAND USE REGULATIONS THAT INCORPORATE INDIVIDUALIZED ASSESSMENTS AND RESULT IN THE IMPOSITION OF A SUBSTANTIAL BURDEN UPON THE EXERCISE OF RELIGION WHERE THERE IS NO DEMONSTRATION OF A COMPELLING GOVERNMENTAL INTEREST JUSTIFYING THE IMPOSITION OF THAT BURDEN OR, WHERE SUCH A COMPELLING INTEREST IS DEMONSTRATED, THE GOVERNMENT HAS NOT ESTABLISHED IT UTILIZED THE LEAST RESTRICTIVE MEANS TO FURTHER THAT INTENT?

The Plaintiff-Appellee's answer: Yes.

The Defendants-Appellants' answer: No.

The Circuit Court did not answer.

The Court of Appeals' answer: Yes.

This Court's Answer should be: Yes.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Plaintiff-Appellee, the Greater Bible Way Temple of the City of Jackson “Greater Bible”),¹ opposes Defendants-Appellants’ Statement of Facts, as it omits numerous relevant facts in the record, favorable to Greater Bible.

Greater Bible’s rights to survive, to use its property for religious purposes and to grow in the City of Jackson hang in the balance of this case. The Church’s religious mission is succinctly stated:

The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes housing, employment, consulting and support as determined appropriate in fulfilling our mission.²

As part of this mission, Greater Bible has invested millions of dollars and revitalized the area in which its is located. The City of Jackson is not merely seeking to protect the rights of Greater Bible’s neighbors and the City as a whole. Instead it has placed a substantial burden³ on Greater Bible through a system of individualized assessments⁴ eliminating the Church’s ability to fulfill its religious mission.

Greater Bible is a large religious organization located at 322 Madison Street.⁵ Greater Bible was started by Reverend Ira Combs, Jr. on November 25, 1980.⁶ He was sent to Jackson

¹ Sometimes also referred to as “the Church”.

² “Part of Plaintiff’s religious mission is to provide housing for the disabled and elderly. Defendant does not question the religious mission of the Plaintiff in any way.” Appellants’ Appendix, 380a.

³ Appellants’ Appendix, 380a.

⁴ Appellants’ Appendix, 379a.

⁵ Appellants’ Appendix, 642a.

⁶ Appellants’ Appendix, 642a.

by the Pentecostal Assemblies of the World.⁷ Greater Bible began its operations in an abandoned and run down building previously owned by New Hope Community Baptist Church.⁸ The area surrounding Greater Bible was riddled with crime, including a proliferation of drug activity.⁹ Greater Bible acquired many City lots surrounding its small building¹⁰ and, through the combined efforts of Reverend Bishop Combs and the City of Jackson's Police Department, began to rid the area of crime.¹¹ Many of the lots were given to Greater Bible with the understanding that it would merely pay the back taxes owed on them.¹²

In 1999, Greater Bible began construction of a new building.¹³ In April, 2000, it moved into this larger facility.¹⁴ The total monetary investment in this project was approximately \$5,000,000.¹⁵ Greater Bible's efforts in the drug ridden and run down neighborhood significantly changed that area of Jackson.¹⁶ People began taking an interest in their properties and rehabilitating them.¹⁷ As a result, property values have increased, thereby increasing property taxes, leading to higher revenues for the City.¹⁸

⁷ Appellants' Appendix, 642a-643a.

⁸ Appellants' Appendix, 643a.

⁹ Appellants' Appendix, 665a-666a.

¹⁰ Appellants' Appendix, 644a-645a.

¹¹ Appellants' Appendix, 666a.

¹² Appellants' Appendix, 644a.

¹³ Appellants' Appendix, 643a.

¹⁴ Appellants' Appendix, 643a.

¹⁵ Appellants' Appendix, 643a.

¹⁶ Appellants' Appendix, 646a-647a, 665a-666a.

¹⁷ Appellants' Appendix, 666a.

¹⁸ Appellants' Appendix, 647a.

Greater Bible currently has approximately 700 members, and provides numerous services to the community.¹⁹ These services include:

- a. A public daycare center serving about one hundred children;²⁰
- b. Tae Kwon Do classes for community youth;²¹
- c. Tae Kwon Do classes for developmentally disabled children;²²
- d. Community Living services to disabled persons offering them the use of the Church's facilities to play basketball, volleyball, tennis and other activities;²³
- e. Youth basketball programs open to the public;²⁴
- f. Wellness Center for weight training and physical fitness for women;²⁵
- g. Transportation services to the public with a fleet consisting of twenty four passenger vans including specialized equipment lifts for wheelchairs, seven mini vans and one station wagon;²⁶
- h. A state of the art commercial kitchen serving over seven hundred community residents and under privileged persons each week;²⁷
- i. Church services on Sundays and Wednesdays.²⁸

Each and every official who testified on behalf of the City of Jackson at trial stated that Greater Bible has been a substantial benefit for that part of town.²⁹ It is not contested that Greater Bible is a spiritual and social beacon in the community.

Contrary to the City of Jackson's characterization, the land use in the area surrounding the Church is diverse.³⁰ Greater Bible is located on the extreme edge of single family housing, one block from a low income-100+ unit apartment complex, near an area zoned light industrial,

¹⁹ Appellants' Appendix, 645a-647a.

²⁰ Appellants' Appendix, 645a.

²¹ Appellants' Appendix, 646a.

²² Appellants' Appendix, 646a.

²³ Appellants' Appendix, 646a.

²⁴ Appellants' Appendix, 646a.

²⁵ Appellants' Appendix, 646a.

²⁶ Appellants' Appendix, 647a; Appellants' Appendix, 3a; Appellants' Appendix, 96a.

²⁷ Appellants' Appendix, 96a.

²⁸ Appellants' Appendix, 647a.

²⁹ Appellants' Appendix, 515a, 556a, 584a.

³⁰ Appellants' Appendix, 225a-230a.

and the Church is located on property zoned for multiple housing (R-4).³¹ It is located on a major street, one half block from a primary artery to the area.³² It is not, as the City of Jackson has contended, in the center of a residential district.

Greater Bible owns 1.13 acres of property across the street from its main sanctuary. When purchased, this property was undeveloped and overrun with box elder trees.³³ The property faces two major streets—Madison Street and Jefferson Street.³⁴ Prior to Greater Bible’s purchase, it was a dumping ground for debris and garbage.³⁵ Greater Bible removed the debris and garbage, and cleared the land of overgrown trees.³⁶ Initially, Greater Bible intended to use the land as a parking lot for its new church facilities.³⁷

After the land was restored, Greater Bible applied for a variance to have it blacktopped for a Church parking lot.³⁸ The City of Jackson denied this request for a variance, and told Greater Bible it would like to see the land used for a **“housing development”, “single-family or otherwise.”**³⁹ As one of Greater Bible’s core missions is providing housing,⁴⁰ the Church focused its efforts and resources on developing the property for that are in response to the City’s encouragement.⁴¹

³¹ Appellants’ Appendix, 516a-519a; Appellants’ Appendix, 225a-230a; Appellants’ Appendix, 92a.

³² Appellants’ Appendix, 502a-503a.

³³ Appellants’ Appendix, 660a-661a.

³⁴ Appellants’ Appendix, 536a.

³⁵ Appellants’ Appendix, 660a; Appellants’ Appendix, 793a.

³⁶ Appellants’ Appendix, 661a; Appellants’ Appendix, 793a.

³⁷ Appellants’ Appendix, 661a.

³⁸ Appellants’ Appendix, 661a, 663a-664a.

³⁹ Appellants’ Appendix, 661a, 663a-664a.

⁴⁰ Appellants’ Appendix, 645a; Appellants’ Appendix, 646a; Appellants’ Appendix, 647a; Appellants’ Appendix, 3a; Appellants’ Appendix, 96a.

⁴¹ Appellants’ Appendix, 661a, 663a-664a.

Greater Bible sought to provide housing for the elderly and disabled in the City of Jackson.⁴² This desire is explicitly stated in Greater Bible's mission statement and letterhead.⁴³ The Church discussed this objective with the City manager and also discussed the need to work with the master plan in providing services to Jackson's elderly and disabled residents.⁴⁴

In pursuing its mission, Greater Bible decided to build multi-unit housing for the elderly and disabled on the 1.13 acres of property across from its main sanctuary.⁴⁵ The City of Jackson did not dispute that providing such housing would be in furtherance of the Church's religious mission.⁴⁶

The 1.13 acres was zoned R-1 (residential housing).⁴⁷ In order to build multi-unit housing, the City required the property to be zoned R-3 (multiple family residential).⁴⁸ Greater Bible submitted a rezoning request which was considered by the City's Region 2 Planning Commission.⁴⁹ When this request was submitted, it was accompanied by a site plan that the Planning Commission provided to City Council.⁵⁰ In a report issued April 3, 2001, the Planning Commission recommended denial of the R-3 zoning request.⁵¹ The Commission found the requested zoning was compatible with Greater Bible's adjacent zoning of R-4 (High Density

⁴² Appellants' Appendix, 651a.

⁴³ Appellants' Appendix, 94a.

⁴⁴ Appellants' Appendix, 651a.

⁴⁵ Appellants' Appendix, 651a-654a.

⁴⁶ "Part of Plaintiff's religious mission is to provide housing for the disabled and elderly. Defendant does not question the religious mission of the Plaintiff in any way." Appellants' Appendix, 380a.

⁴⁷ Appellants' Appendix, 502a; Appellants' Appendix, 94a; Appellants' Appendix, 118a.

⁴⁸ Appellants' Appendix, 94a; Appellants' Appendix, 118a.

⁴⁹ Appellants' Appendix, 94a; Appellants' Appendix, 118a.

⁵⁰ Appellants' Appendix, 118a-119a.

⁵¹ Appellants' Appendix, 94a; Appellants' Appendix, 118a.

Apartment & Office), but nevertheless recommended against rezoning due to **aesthetic** and **traffic concerns**.⁵²

On April 11, 2001, the Jackson City Planning Commission held its first public hearing on Greater Bible's rezoning request. Only **one** person spoke at the hearing in opposition to the rezoning.⁵³ The following persons spoke in favor of rezoning: Bishop Ira Combs, Maurice Fitzpatrick, Dennis Treadway, Ed Woods, Mike Shawn, Greg Krump, and Vince Adams.⁵⁴

In addition, U.S. Representative Nick Smith submitted a letter favoring rezoning for the proposed housing project⁵⁵ as did State Senator Philip Hoffman.⁵⁶ The Center for Independent Living similarly submitted a letter in favor of Greater Bible, noting that Jackson has a need for barrier free housing.⁵⁷ Further, a petition containing over 60 names of persons supporting the Church's proposed use was also submitted.⁵⁸ Notwithstanding the overwhelming support for the rezoning, the Planning Commission voted 6-1 (1 member abstained and one member was absent) to recommend denial of Greater Bible rezoning request.⁵⁹

On April 24, 2001, the Jackson City Council held a second public hearing on the rezoning.⁶⁰ Although the City Council took public comment, it delayed acting on the rezoning request until its next meeting.⁶¹ At the City Council meeting of May 8, 2001, the Council voted

⁵² Appellants' Appendix, 94a; Appellants' Appendix, 118a.

⁵³ Appellants' Appendix, 96a; Appellants' Appendix, 127a.

⁵⁴ Appellants' Appendix, 95a.

⁵⁵ Appellants' Appendix, 95a; Appellants' Appendix, 120a.

⁵⁶ Appellants' Appendix, 95a; Appellants' Appendix, 121a.

⁵⁷ Appellants' Appendix, 95a; Appellants' Appendix, 122a.

⁵⁸ Appellants' Appendix, 95a; Appellants' Appendix, 123a-125a.

⁵⁹ Appellants' Appendix, 96a; Appellants' Appendix, 126a-127a.

⁶⁰ Appellants' Appendix, 96a; Appellants' Appendix, 128a.

⁶¹ Appellants' Appendix, 96a; Appellants' Appendix, 128a.

consistent with the City Planning Commission's recommendation to deny the rezoning request.⁶² The City's Mayor objected to the project because it would be tax exempt.⁶³ Other City officials recommended Greater Bible buy land one block away and move the elderly project there.⁶⁴ Greater Bible investigated whether the land was for sale, and determined that it was not.⁶⁵ Greater Bible also retained a real estate agent to find other available land within the City of Jackson zoned R-3.⁶⁶ The realtor determined there was not one piece of land for sale in the City of Jackson with R-3 zoning.⁶⁷ Greater Bible timely sought judicial review of the City's denial of its rezoning request by application to the circuit court.

Greater Bible's Complaint contained two counts.⁶⁸ Count I was for appellate review of the City's denial.⁶⁹ Count II advanced a claim under the Religious Land Use and Institutional Person's Act 42 USC 2000cc (RLUIPA).⁷⁰ Jackson County Circuit Court Judge Alexander C. Perlos directed the parties to submit counter motions for summary disposition on Count I, and ordered that Count II be addressed at a later date if necessary. In an Order dated August 2, 2002, Judge Perlos ruled on Count I, affirming the City's denial of the rezoning application.⁷¹

Judge Perlos retired from the bench in January 2003,⁷² and the case was reassigned to the Honorable Chad C. Schmucker.⁷³

⁶² Appellants' Appendix, 96a; Appellants' Appendix, 129a-132a.

⁶³ Appellants' Appendix, 691a.

⁶⁴ Appellants' Appendix, 550a, 554a-555a.

⁶⁵ Appellants' Appendix, 703a.

⁶⁶ Appellants' Appendix, 152a16-153a23

⁶⁷ Appellants' Appendix, 152a16-153a23

⁶⁸ Appellants' Appendix, 13a-30a.

⁶⁹ Appellants' Appendix, 14a.

⁷⁰ Appellants' Appendix, 18a.

⁷¹ Appellants' Appendix, 49a-51a.

⁷² Appellants' Appendix, 3a.

⁷³ Appellants' Appendix, 3a.

Thereafter, the City moved for Summary Disposition on Count II, claiming RLUIPA did not apply because it did not make an “individualized assessment” pursuant to that statute.⁷⁴ The City also argued that “its denial did not substantially burden the religious exercise of the Church,” but if it did, the City had compelling governmental interests to justify that burden.⁷⁵ The City did not contend RLUIPA was unconstitutional.⁷⁶

Greater Bible filed its own Motion for Summary Disposition, arguing that RLUIPA applied and that Greater Bible’s exercise of religion was substantially burdened without justification by a compelling governmental interest.⁷⁷

Oral argument was heard by the trial court on January 16, 2003. Following argument, the court ordered the parties to submit supplemental briefs on the issues of individualized assessments and compelling governmental interests.⁷⁸

On February 25, 2003, the trial judge issued its ruling on the cross motions for summary disposition.⁷⁹ He denied the City of Jackson’s motion for summary disposition in its entirety.⁸⁰ Greater Bible’s motion for summary disposition was granted in part.⁸¹ The court ruled that the City of Jackson had performed an individualized assessment, that RLUIPA did apply and that Greater Bible had suffered a substantial burden to its exercise of religion.⁸² The court noted:

The Greater Bible Way Temple of Jackson is not a newcomer to this neighborhood. They have made a substantial investment in this area many years. The City is putting the Church in either a

⁷⁴ Appellants’ Appendix, 61a.

⁷⁵ Appellants’ Appendix, 65a-66a.

⁷⁶ Appellants’ Appendix, 52a-86a.

⁷⁷ Appellants’ Appendix, 87a-153a; Appellants’ Appendix, 153a1-153a23.

⁷⁸ Appellants’ Appendix, 241a-245a.

⁷⁹ Appellants’ Appendix, 378a-382a.

⁸⁰ Appellants’ Appendix, 378a-382a.

⁸¹ Appellants’ Appendix, 378a-382a.

⁸² Appellants’ Appendix, 378a-382a.

position of relocating its entire operation if they want apartments adjacent to the Church or having apartments at a different location. Both of these choices impose a substantial burden on the Church.⁸³

The court ordered trial on the issues of whether the City had compelling governmental interests, and whether it had taken the least restrictive means to further those interests.⁸⁴ Trial on these limited issues was conducted on July 14th and 15th, 2003.

Prior to trial, Greater Bible worked hard at resolving the dispute with the City of Jackson.⁸⁵ The Church's original plan called for 32 elderly and disabled units.⁸⁶ Greater Bible subsequently reduced the original proposal to 20 units,⁸⁷ then ultimately submitted a plan for 13 units.⁸⁸ Greater Bible even offered to exchange land with the City. The City failed to budge on its position and would not approve any of the down-sized plans submitted by Greater Bible.⁸⁹

At trial, the City called its Assessor, John Markowski, to testify.⁹⁰ He is a Level 4 Assessor and testified that he had limited familiarity with Greater Bible's project.⁹¹ It was his opinion that the 32 unit elderly and disabled complex originally proposed by the Church would **not** have a detrimental effect on single family residences in the area.⁹² He further testified that senior housing does **not** generally have a negative effect on surrounding property values.⁹³ He even disclosed that there was an elderly complex near his own residence and it was not a

⁸³ Appellants' Appendix, 380a-381a.

⁸⁴ Appellants' Appendix, 382a.

⁸⁵ Appellants' Appendix, 628a; Appellants' Appendix, 245a-247a.

⁸⁶ Appellants' Appendix, 628a, 652a-653a.

⁸⁷ Appellants' Appendix, 628a, 652a-653a.

⁸⁸ Appellants' Appendix, 628a, 652a-653a.

⁸⁹ Appellants' Appendix, 628a, 652a-653a.

⁹⁰ Appellants' Appendix, 592a.

⁹¹ Appellants' Appendix, 593a.

⁹² Appellants' Appendix, 598a.

⁹³ Appellants' Appendix, 596a.

detriment to the area.⁹⁴ Mr. Markowski testified that Greater Bible was a “positive thing for that area” of town.⁹⁵ He also testified that Greater Bible’s large development did not have a negative effect on the area.⁹⁶ He noted that the values in the lots near Greater Bible had increased approximately \$2,500.00 each since Greater Bible built its large facility.⁹⁷

Mr. Markowski further testified that the only party to recently build homes near the Church was Habitat for Humanity, which had constructed two.⁹⁸ The total applications for new housing in the City of Jackson was less than 10 for all of 2002.⁹⁹ In addition, Mr. Markowski testified that there is a need for housing in Jackson, especially for the elderly and disabled.¹⁰⁰

The City also called Charles Reisdorf, a member of the Region 2 Planning Commission to testify.¹⁰¹ He said Greater Bible’s elderly and disabled housing would not cause any environmental harm to the area.¹⁰² He observed there was R-3 zoning within five hundred feet of the Church’s property.¹⁰³ Mr. Reisdorf did not believe that emergency vehicles would have difficulty gaining access to Greater Bible’s elderly and disabled complex.¹⁰⁴ He had not heard of any “traffic congestion that was sufficient to prohibit the moving of vehicles down the street.”¹⁰⁵ Mr. Reisdorf was aware that commercial projects had been developed in residential

⁹⁴ Appellants’ Appendix, 596a.

⁹⁵ Appellants’ Appendix, 601a.

⁹⁶ Appellants’ Appendix, 601a-602a.

⁹⁷ Appellants’ Appendix, 602a.

⁹⁸ Appellants’ Appendix, 527a-528a, 559a.

⁹⁹ Appellants’ Appendix, 526a-527a.

¹⁰⁰ Appellants’ Appendix, 529a.

¹⁰¹ Appellants’ Appendix, 470a-471a.

¹⁰² Appellants’ Appendix, 531a.

¹⁰³ Appellants’ Appendix, 535a.

¹⁰⁴ Appellants’ Appendix, 535a.

¹⁰⁵ Appellants’ Appendix, 535a.

neighborhoods without a negative effect on surrounding homes.¹⁰⁶ However, he opined that Greater Bible's project would be a "better fit" if it was five hundred feet down the street.¹⁰⁷ Mr. Reisdorf agreed that elderly complexes have less noise and fewer visitors, and as such, have less of an impact on an area.¹⁰⁸ Further, he acknowledged that the City of Jackson did not conduct an impact study to determine how elderly and disabled housing would affect the area surrounding Greater Bible.¹⁰⁹

Greater Bible's land is located on the northeast quadrant of a residential district, and has R-4 zoning directly across the street.¹¹⁰ Mr. Reisdorf noted that there was a large housing complex one block from this land containing over 100 units.¹¹¹ He also testified that the property at the end of Greater Bible's block was zoned multiple family, R-3.¹¹² Mr. Reisdorf testified that the City was using a land use plan that had not been updated in the previous 14 years.¹¹³ He agreed that there was no evidence rezoning Greater Bible's property from R-1 to R-3 would cause blight in the area around Greater Bible, but he did have concerns that it could.¹¹⁴ Mr. Reisdorf agreed that if Greater Bible was to obtain rezoning, it would still have to adhere to all other building provisions in the Jackson City Code, such as set back requirements and parking

¹⁰⁶ Appellants' Appendix, 532a-533a.

¹⁰⁷ Appellants' Appendix, 534a-535a.

¹⁰⁸ Appellants' Appendix, 514a.

¹⁰⁹ Appellants' Appendix, 515a.

¹¹⁰ Appellants' Appendix, 516a.

¹¹¹ Appellants' Appendix, 517a.

¹¹² Appellants' Appendix, 519a.

¹¹³ Appellants' Appendix, 510a.

¹¹⁴ Appellants' Appendix, 522a.

lot restrictions.¹¹⁵ He made it clear that he was not testifying that existing roads would be unable to accommodate the R-3 zoning.¹¹⁶

In March, 2000, the City conducted a study of traffic in the area around the Church.¹¹⁷ One study recommended that a light at a corner in proximity to Greater Bible be removed and stop signs installed¹¹⁸ because there was not enough traffic to justify that light.¹¹⁹ Another study of the next closest intersection reached a similar conclusion.¹²⁰ Mr. Reisdorf testified that he was familiar with the area and was not surprised that it lacked signal lights because the amount of traffic failed to justify them.¹²¹

The City next called attorney Charles Aymond to testify.¹²² Mr. Aymond is chair of the City of Jackson Planning Commission.¹²³ He did not know whether Greater Bible's elderly and disabled housing would or would not destabilize the area.¹²⁴ He testified that the area at the end of Greater Bible's block is zoned R-3.¹²⁵ Mr. Aymond believed that moving Greater Bible's project just one block down would not cause blight or destabilize the area.¹²⁶ He was unaware of whether any of the land a block away was for sale.¹²⁷

¹¹⁵ Appellants' Appendix, 524a.

¹¹⁶ Appellants' Appendix, 525a.

¹¹⁷ Appellants' Appendix, 525a-526a.

¹¹⁸ Appellants' Appendix, 525a-526a.

¹¹⁹ Appellants' Appendix, 525a-526a.

¹²⁰ Appellants' Appendix, 525a-526a.

¹²¹ Appellants' Appendix, 525a-526a.

¹²² Appellants' Appendix, 545a.

¹²³ Appellants' Appendix, 545a.

¹²⁴ Appellants' Appendix, 549a.

¹²⁵ Appellants' Appendix, 555a.

¹²⁶ Appellants' Appendix, 555a.

¹²⁷ Appellants' Appendix, 554a.

The City also called Dennis Diffenderfer to testify.¹²⁸ Mr. Diffenderfer was employed by the City's Department of Community Development.¹²⁹ He testified that the City had many large rental projects that have had a negative effect on the surrounding area,¹³⁰ but none of the projects he described involved elderly or disabled housing.¹³¹ Rather, they were low income rental projects consisting of "well over a hundred units".¹³² Mr. Diffenderfer had no statistical information regarding the impact of 20 unit complexes, but he agreed that the lesser the units the lower the potential crime rate and police calls to the housing facility.¹³³ He was only "vaguely" familiar with Greater Bible's elderly and disabled housing project.¹³⁴ He did not know with certainty what effect that project would have on the area.¹³⁵ However, he acknowledged that other elderly projects in the City of Jackson have not caused blight or destabilization of the surrounding areas.¹³⁶

James Pappas, a licensed architect, testified on behalf of Greater Bible.¹³⁷ Mr. Pappas specializes in the design of senior housing,¹³⁸ and has developed several thousand elderly housing projects.¹³⁹ He believed that elderly housing is a positive amenity to most neighborhoods, because the typical senior development creates less traffic, and is maintained

¹²⁸ Appellants' Appendix, 567a.

¹²⁹ Appellants' Appendix, 567a.

¹³⁰ Appellants' Appendix, 571a.

¹³¹ Appellants' Appendix, 580a.

¹³² Appellants' Appendix, 579a.

¹³³ Appellants' Appendix, 579a-580a.

¹³⁴ Appellants' Appendix, 583a.

¹³⁵ Appellants' Appendix, 583a.

¹³⁶ Appellants' Appendix, 588a-590a.

¹³⁷ Appellants' Appendix, 727a.

¹³⁸ Appellants' Appendix, 727a.

¹³⁹ Appellants' Appendix, 730a.

extremely well.¹⁴⁰ Mr. Pappas did not believe crime was a problem in elderly housing.¹⁴¹ He designs elderly projects so they fit with their surroundings.¹⁴²

Mr. Pappas visited Greater Bible's property many times, investigated alleyways, looked at the property size and capacity of utilities, and did what was necessary for potential development of the site.¹⁴³ He believed there would not be "any" negative effect on the area, and that Greater Bible's housing project would have a positive effect.¹⁴⁴ Mr. Pappas did not believe the project would destabilize the surrounding area.¹⁴⁵ He had not seen elderly projects cause blight in other communities, and would not expect Greater Bible's elderly housing project to cause blight either.¹⁴⁶

Mr. Pappas did not feel the City's alleged traffic concerns were legitimate, as elderly homes have significantly less traffic flow than single family housing.¹⁴⁷ He believed Greater Bible's project would not cause overcrowding to the surrounding area.¹⁴⁸ He would build the elderly housing with a residential character to blend with the neighborhood.¹⁴⁹ Parking would not be a concern, as there would be adequate on site parking, as well as off-street parking.¹⁵⁰

Mr. Pappas agreed with the testimony of Charles Relsdorf, that even if the property was rezoned from R-1 to R-3, Greater Bible would not have unbridled use of property.¹⁵¹ The

¹⁴⁰ Appellants' Appendix, 731a.

¹⁴¹ Appellants' Appendix, 731a.

¹⁴² Appellants' Appendix, 731a.

¹⁴³ Appellants' Appendix, 729a.

¹⁴⁴ Appellants' Appendix, 732a.

¹⁴⁵ Appellants' Appendix, 734a.

¹⁴⁶ Appellants' Appendix, 735a.

¹⁴⁷ Appellants' Appendix, 735a.

¹⁴⁸ Appellants' Appendix, 736a.

¹⁴⁹ Appellants' Appendix, 738a.

¹⁵⁰ Appellants' Appendix, 735a, 752a, 760a.

¹⁵¹ Appellants' Appendix, 759a.

Church would still have to conform to those sections of the Jackson City Code that have general applicability, such as setback requirements, lot size restrictions, height restrictions, parking requirements, landscaping and screening requirements, non-conforming lot requirements, screening of trash facilities, fence height requirements, and other provision within the Jackson City Code.¹⁵²

After considering the evidence presented, the trial court ruled that the City had implemented a land use regulation in a manner that imposed a substantial burden on Greater Bible's exercise of religion.¹⁵³ The trial court further ruled that the City had failed to demonstrate that this substantial burden was in furtherance of a compelling governmental interest.¹⁵⁴ The court ruled that Jackson had violated RLUIPA.¹⁵⁵

Contrary to the present position of the City of Jackson, it did not challenge the constitutionality of RLUIPA in the trial court and it obtained no ruling on that issue.

The City of Jackson appealed the trial court's determination. The Court of Appeals issued its published opinion on November 10, 2005, affirming the trial court on all issues, including the award of attorney fees and costs to Greater Bible as a prevailing party under RLUIPA. See *Greater Bible Way Temple of Jackson v City of Jackson*, 268 Mich App 673; 708 NW2d 756 (2005), (Docket Nos. 250863, 255966).¹⁵⁶ (The issues concerning the award of attorney fees are addressed in the companion Brief in Opposition to Defendants-Appellants' Brief on Appeal, Supreme Court Case No. 130196.)

¹⁵² Appellants' Appendix, 759a-760a.

¹⁵³ Appellants' Appendix, 863a2

¹⁵⁴ Appellants' Appendix, 818a

¹⁵⁵ Appellants' Appendix, 818a

¹⁵⁶ Appellants' Appendix, 940a-947a.

On December 22, 2005, the City filed Applications for Leave to Appeal from the Court of Appeals' published opinion. This Court granted leave on May 4, 2006, ordering that the present case be consolidated with the case concerning the award of attorney fees to Greater Bible (Supreme Court Case No. 130196).

The City of Jackson's appeals are timely and this Court has discretionary jurisdiction to review the Court of Appeals' decision. However, that decision is fundamentally sound and there are no errors in the lower courts' reasoning or holdings that would warrant reversal. Therefore, the Court of Appeals' November 10, 2005 opinion should be affirmed.

STANDARD OF REVIEW

Greater Bible accepts the City of Jackson's Standard of Review with the following additions. A party fails to preserve an issue for appellate review when it fails to challenge the constitutionality of the statute in the trial court.¹⁵⁷ Generally, an issue is unpreserved if it is not "properly" raised before the trial court.¹⁵⁸ If properly preserved, the constitutionality of a statute is reviewed de novo as a question of law.¹⁵⁹ Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.¹⁶⁰ Further, when considering a statute's constitutionality, the Court does not inquire into the wisdom of the legislation.¹⁶¹ This Court is bound by decisions of the United States Supreme Court.¹⁶² Under a rational-basis review of a federal statute, courts are to uphold legislation as long as that legislation is rationally related to a legitimate government purpose.¹⁶³ The purpose of statutory interpretation is to give effect to the intent of the Legislature.¹⁶⁴ If a statute is clear, it is to be enforced as plainly written.¹⁶⁵ However, if a statute is susceptible to more than one interpretation, this court can engage in judicial construction and interpret the statute.¹⁶⁶ In interpreting a statute, words are to be given their common, generally accepted meaning.¹⁶⁷

¹⁵⁷ *People v Jensen*, 222 Mich App 575, 579; 564 NW2d 192 (1997), vacated in part on other grounds, 456 Mich 935; 575 NW2d 552 (1998)

¹⁵⁸ *People v Grant*, 455 Mich 535, 546-547; 520 NW2d 123 (1994).

¹⁵⁹ *McDougall v Schanz*, 461 Mich 15, 23; 597 NW2d 148 (1999).

¹⁶⁰ *Id.* at 24

¹⁶¹ *Council of Organizations & Others for Ed Acout Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997).

¹⁶² *People v Stevens*, 460 Mich 626; 597 NW2d 53 (1999).

¹⁶³ *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970).

¹⁶⁴ *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; *Piper v Pettibone Corp*, 450 Mich 565, 571; 542 NW2d 269 (1995).

¹⁶⁷ MCL 8.3a; MSA 2.212(1); *Hawley v Snider*, 346 Mich 181, 185; 77 NW2d 754 (1956).

ARGUMENT

I. THE EXTENSIVE PROCEDURES SET FORTH IN THE CITY OF JACKSON'S ZONING ORDINANCE WHICH WERE IMPLEMENTED AND FOLLOWED IN REVIEW OF GREATER BIBLE'S REQUEST FOR REZONING AMOUNT TO AN INDIVIDUALIZED ASSESSMENT WHICH TRIGGERED RLUIPA

Contrary to the City of Jackson's position, Greater Bible's request for rezoning its property would not create "a multiple-family zoning district as an island within the subdivision." In fact, the area surround Greater Bible's property is quite diverse. Greater Bible is located on the extreme edge of single family housing, one block from a low income-100+ unit apartment complex, near an area zoned light industrial, and its church is on property that is zoned for multiple housing (R-4). Greater Bible is located on a major street, one half block from a second street that serves as a major artery to the area. The City's portrayal of Greater Bible and the property at issue as being at the center of a residential district is factually inaccurate.

After the Church requested the City to rezone its property to multiple-family dwellings, the City undertook substantial procedures to review that request pursuant to its zoning ordinance. These procedures included a subjective review of the site plan for the proposed use of the property which ultimately resulted in a determination to deny the rezoning. The procedure utilized, as set forth in the Jackson City Code, is clearly a system calling for an individualized assessment within the meaning of RLUIPA.

A. Zoning and Rezoning are Contemplated as Individual Assessments under RLUIPA.

In *Employment Division v Smith*, 494 US 872, 879; 110 S Ct 1595; 108 L Ed 2d 876 (1990), the Supreme Court held that the Free Exercise Clause does not grant religious actors a reprieve from compliance from neutral laws of generally applicability. The Court refused to apply the balancing test in *Sherbert v Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963)

which held that governmental actions that impose a substantial burden on religious practice must be justified by a compelling governmental interest.¹⁶⁸ The Court concluded that *Sherbert* applied to the narrow issue of denial of unemployment and did not apply to neutral laws of general applicability. *See Smith* at 879. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 USC 2000bb, *et seq.* RFRA was to replace the neutrality test with the "compelling interest test" set forth in *Sherbert* and *Wisconsin v Yoder*, 406 US 205; 92 S Ct 1526; 32 L Ed 2d 15 (1972), and to guarantee its application in all cases where free exercise of religion was substantially burdened.¹⁶⁹ In *City of Boerne v Flowres*, 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997) the Supreme Court then held that RFRA was unconstitutional as applied to the states. In response, Congress passed RLUIPA.

Boerne reaffirmed *Sherbert* insofar as that case holds that a state with a system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship or, in the language of the present Act, of "a substantial burden on . . . religious exercise." *Boerne* at 512-14.

To avoid coming into conflict with the Supreme Court's holding in *Smith*, Congress limited RLUIPA's scope to instances presenting individualized assessments. More specifically, for present purposes, RLUIPA is limited to cases where zoning boards make "individualized assessments" of the proposed use of the property involved.

RLUIPA is applicable to situations where a substantial burden is imposed upon a church by the implementation of a "land use regulation." RLUIPA provides, in relevant part, as follows:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious

¹⁶⁸ See *Smith*, 494 US at 883-8.

¹⁶⁹ 42 USC 2000bb(b)(1) & (a)(2).

exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest. 42 USC 2000cc(a)(1)(A), (B)

In order to obtain the statutory protections provided in sections (a)(1)(A) and (B) of RLUIPA, a plaintiff must establish that it has met one of three requirements. The requirement embodied in section 2(a)(2)(C) of RLUIPA is met when the government can use its discretion in a formal or informal proceeding, and either grant or deny a land owner's proposed use of property:

...the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.¹⁷⁰

The United States Court of Appeals for the Ninth Circuit recently noted that zoning ordinances written in general and neutral terms would not typically offend RLUIPA. However, when a zoning ordinance is applied to grant or deny a use to a particular parcel of land, that application is an “implementation” under 42 USC 2000cc(2)(C). *Guru Nanak Sikh Soc’y v County of Sutter*, 2006 US App Lexis 19297 (9th Cir. 2006).

The Ninth Circuit's newly issued opinion supports affirmance in the present case but, in truth, it is an overly restrictive view of RLUIPA's reach.

No one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations though zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant

¹⁷⁰ 42 USC 2000cc 2(a)(2)(C).

land use regulations. They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.¹⁷¹

See also *Cam v Marion County*, 987 F Supp 854, 861-62 (D Or 1997) (holding that a zoning scheme was not neutral and generally applicable).

RLUIPA is intended to apply to zoning ordinances because, by their nature, these ordinances call for individual assessments. Even assuming that zoning ordinances require individualized assessments, the City of Jackson's actions in this case clearly amounted to an individualized assessment.

B. The City of Jackson's Actions in its Denial of Greater Bible's Request for a Rezoning Amounted to An Individualized Assessment Under RLUIPA.

The City of Jackson's denial of Greater Bible's rezoning request cannot be properly characterized as one falling within the purview of generally applicable laws. In this case, the City relied upon a patently subjective and discretionary procedure.

RLUIPA applies to any zoning law that regulates the development or use of land through a formal process allowing the government to make decisions about a proposed use of land. This formal process has been designated an "individualized assessment".

The City of Jackson claims that a decision to rezone is "legislative action that sets policy" and therefore it does not amount to an individualized assessment contemplated by RLUIPA. The City cites *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 645 NW2d 50 (2002) to stand for the proposition that zoning and rezoning are legislative functions and therefore, they cannot be individualized assessments. In support of this contention, the City provides a detailed review of the standards used in a traditional zoning appeal from a denial of a rezoning request.

¹⁷¹ *Cottonwood Christian Center v City of Cypress*, 218 F Supp 2d 1203 (CD Cal 2002).

However, these standards are not applicable in this case. As pointed out by the City, one aspect of Greater Bible's circuit court case was a traditional zoning appeal. That appeal was dismissed by the Court. Greater Bible did not appeal that dismissal and it is not before this Court. What is before this Court is RLUIPA, and whether or not the City of Jackson performed an individualized assessment under that statute.

The City of Jackson argues that because rezoning is legislative and performed pursuant to laws of general applicability, it is outside of the scope of RLUIPA. The plain meaning of 2000cc(2)(C) belies this contention. "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use."¹⁷² In this case the City of Jackson's zoning ordinance provides for an extensive procedure for a proposed zoning change; it requires a written application, a hearing, and subjective, discretionary consideration by the city council.¹⁷³

The Court of Appeals correctly likened a rezoning request to the use variance considered in *Shepherd Montessori Center Milan v Ann Arbor Charter Township*, 259 Mich App 315; 675 NW2d 271 (2003). In *Shepherd Montessori*, the court found that a township's evaluation and denial of a plaintiff's request for a use variance under the local ordinance constituted an individualized assessment under RLUIPA. The reasoning in *Shepherd Montessori* was that an individualized assessment is involved when formal or informal procedures exist that allow for an individualized assessment. *Id.*, p 327. Clearly, the City had formal procedures in place to allow for an individualized assessment in this case.

¹⁷² *Guru Nanak Sikh Society v County of Sutter, supra.*

¹⁷³ Jackson City Code 28-183.

Here, Greater Bible filed a rezoning application to change the use of its property. Pursuant to the City of Jackson's ordinance, the City Planning Commission reviewed the application, reviewed the site plan submitted by Greater Bible, looked at the surrounding area, considered the potential impact to that area, reviewed the City's Land Use Plan, held public hearings, and purportedly considered the impact of the rezoning on traffic. Based on these factors, the City Planning Commission recommended to City Council that it deny Greater Bible's proposed use of the property. This was not the creation of policy for the system of regulation as the City would have this Court believe.

The City of Jackson has used its discretion on numerous occasions and granted similar rezoning requests.¹⁷⁴ This incontrovertible fact further establishes that its actions here amounted to an individualized assessment under RLUIPA.

¹⁷⁴ Appellants' Appendix, 95a; Appellants' Appendix, 120a.

CITY OF JACKSON REZONING DECISIONS – AUGUST 22, 2000 – MAY 22, 2002

<u>DATE</u>	<u>ADDRESS</u>	<u>ZONING CHANGE</u>	<u>CITY ACTION</u>
August 22, 2000	Page Avenue	to I-2	Granted
February 13, 2001	44 acres “Leoni site”	I-2 to I-1	Granted
April 10, 2001	Portion of 555 Airline Drive	I-2 to I-1	Granted
May 8, 2001	Greater Bible Way- portion of Blackstone, Jefferson, Lansing, and Madison	R-1 to R-3	Denied
May 8, 2001	219 E. Wesley Street	I-2 to C-3	Granted
September 4, 2001	Alley East of Francis St. & north high St.	R-1 to C-2	Granted
November 13, 2001	W. side of Wisner St. at intersection of Monroe S.	R-4 to C-4	Granted
December 11, 2001	106-116 Edgewood St.	R-2 to R-4	Granted
December 11, 2001	1124,1130, & 1132 Cooper St.	R-2 to C-2	Granted
March 12, 2002	N terminus of N. Horton St.	R-3 to I-2	Granted
May 28, 2002	1212 Wildwood St.	I-2 to C-2	Granted
May 28, 2002	801 Page Ave.	I-2 to I-1	Granted

Obviously, the City of Jackson granted similar rezoning requests but denied Greater Bible’s rezoning request. It plainly employs a discretionary process to individually assess each request. This process unquestionably invokes individualized, subjective judgments. There are no objective standards that govern these approvals and denials of proposed land uses. Each decision simply rests within the discretion of the Jackson City Council.

The City argues that it did not consider the nature of the party applying for the rezoning, its decision was content neutral and did not entail an individualized assessment. This same argument was rejected in *Cottonwood Christian Center, supra* at 1223.

Defendants argue that the “individualized assessments” exception to *Smith* is only for cases where the government creates exceptions to the statutory scheme for secular purposes, but not for religious purposes. According to Defendants, the exception encompasses only situations ‘where the statutory scheme at issue allows the government to make value judgments concerning religious beliefs and not simply where the government makes legislative decisions with respect to applying generally-applicable zoning redevelopment, and eminent domain laws.’ Defendants’ argument mischaracterizes the nature of their actions and improperly cabins the protections of the Free Exercise Clause in a way that begs for local officials to discriminate against religious institutions.

The City of Jackson’s Zoning Code is a regulation within the meaning of the RLUIPA, that provides a mechanism for individualized assessments of proposed land uses. The trial court was correct in determining RLUIPA’s applicability. The Court of Appeals was similarly correct in affirming the ruling of the trial court. The decisions reached below should be left undisturbed.

II. GREATER BIBLE SUFFERED A SUBSTANTIAL BURDEN ITS RELIGIOUS EXERCISE WHEN ITS REQUEST FOR REZONING WAS DENIED, PREVENTING IT FROM BUILDING ELDERLY AND DISABLED HOUSING ON ITS OWN PROPERTY WHEN NO OTHER PROPERTY EXISTED IN THE CITY OF JACKSON ON WHICH GREATER BIBLE COULD BUILD AND ESTABLISH HOUSING FOR THE ELDERLY AND DISABLED IN FURTHERANCE OF ITS RELIGIOUS MISSION

The City of Jackson imposed a substantial burden on Greater Bible’s religious exercise as it prevented the Church from building an elderly and disabled housing complex in furtherance of its mission.

RLUIPA states:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,

unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

Under RLUIPA, 42 USC 2000cc(2), it is the plaintiff's burden to produce prima facie evidence to support a violation of the Act. Once that burden is met, the government bears the burden of persuasion on any remaining element of the claim. Section 4(b) of RLUIPA provides:

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 (i.e. substantial burden), the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the Plaintiff's exercise of religion. (Emphasis added)

Here, the trial court ruled that Greater Bible had established the requisite prima facie case. This determination was amply supported by the evidence introduced at trial and the Court of Appeals correctly affirmed.

A. Providing Housing to the Elderly and Disabled is Central to Greater Bible's Religious Mission and Qualifies as Religious Exercise Under RLUIPA.

The trial court's Opinion and Order dated February 25, 2003, clearly determined that providing housing was part of Greater Bible's religious mission. That order stated: "Part of Plaintiff's religious mission is to provide housing for disabled and elderly. Defendant does not question the religious mission of the Plaintiff in any way."¹⁷⁵

¹⁷⁵ Appellants' Appendix, 380a.

Although the mission of Greater Bible was not disputed by the City at trial, it now contends that Greater Bible's proposed use of the property is commercial and does not amount to religious exercise under RLUIPA.

Congress did not define the term "substantial burden." It did, however, take care to define the term religious exercise in 42 USC 2000cc(8)(7):

(A) IN GENERAL – The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

Contrary to the arguments advanced by the City, Congress specified that the "centrality" of a religious practice may not be considered. This is consistent with the admonition in *Employment Div v Smith, supra*, that courts avoid "[j]udging the centrality of different religious practices [because it] is akin to the unacceptable business of evaluating the relative merits of differing religious claims."¹⁷⁶ Further, it is "not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."¹⁷⁷ RLUIPA's statutory definition codifies the Supreme Court's directive that court's should not question the centrality of particular beliefs or practices of faith.

The City attempts to persuade this Court that Greater Bible's proposed use of the property is nothing more than a commercial venture and contends that the record is devoid of any description of a particular intended use for the property. However, Reverend Bishop Ira Combs,

¹⁷⁶ 494 US 872, 887 (1990).

¹⁷⁷ *Hernandez v Comm'r of Internal Revenue*, 490 US 680, 699; 109 S Ct 2136; 104 L Ed 2d 766 (1989).

averred in his affidavit that “It is the mission of the Church to provide housing to the elderly and disabled, and is central to our ministry in the City of Jackson”¹⁷⁸ He also averred: “The Greater Bible Way Temple wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of Jackson.”¹⁷⁹ Further, the Bishop testified at trial that Greater Bible’s intention for the property was “meeting some of the housing needs of the low income senior citizens and handicapped people in the community.”¹⁸⁰ The City of Jackson never questioned that providing housing was within the religious mission of Greater Bible, and the record is clear that providing housing to the elderly and disabled in furtherance of that mission was the proposed use of the property. Providing housing to the elderly and disabled are central to Greater Bible’s religious mission and amount to religious exercise under RLUIPA.

B. The City has Imposed a Substantial Burden on Greater Bible’s Exercise of Religion by Denying Greater Bible’s Rezoning Request.

Addressing the issue of substantial burden, the trial court ruled that Greater Bible would have to move its entire operation to another area, or would have to have its elderly and disabled housing project in an area away from the services provided by the Church’s main facility. The trial court held that doing so placed a substantial burden on Greater Bible’s exercise of religion:

Plaintiff notes that the Church provides meals, religious activities, social activities, and related services such as a religious bookstore. There are obvious financial, logistic and organizational advantages to having Church sponsored apartments in close proximity to the main Church building.

There are various areas in the City of Jackson that are zoned for apartments. Some of these areas are relatively close to the main Church building. However, at this time none of those properties are for sale.

¹⁷⁸ Appellants’ Appendix, 153a12.

¹⁷⁹ Appellants’ Appendix, 153a13.

¹⁸⁰ Appellants’ Appendix, 650a-651a.

On those uncontested facts I find that the Defendants zoning decision has substantially burdened this Church's free exercise of their religious beliefs.

...

The Greater Bible Way Temple is not a newcomer to this neighborhood. They have made a substantial investment in the area many years. The City is putting the Church in either a position of relocating its entire operation if they want apartment adjacent to the Church or having apartments at a different location. Both of these choices impose a substantial burden on the Church. (Emphasis added)¹⁸¹

Unquestionably, the burdens placed on Greater Bible by the City are substantial. First, Greater Bible proved that it suffered a substantial financial burden. The Church purchased land, sought to develop it, and established in the trial court that it would suffer a loss of its investment of \$150,000.00 if the land went undeveloped. Ironically, it made this investment specifically because the City encouraged it to build a housing project. If Greater Bible were to resell these lots, it would not come close to recouping its loss. The City tax assessor testified at trial that the vacant lots had a value of \$2,500.00, each and that the only parties building homes in that area of town was the Department of Housing and Urban Development.

Not only did Greater Bible prove that it would suffer a substantial financial burden, but it proved that it could not further its mission anywhere else in the City of Jackson. In response to the City's position that it should move its project to another area of town, the Church retained a realtor to find other property within the City that was for sale and zoned for multiple family use. This realtor investigated and reported that there was **not any** property for sale that would

¹⁸¹ Appellants' Appendix 380a-381a.

accommodate Greater Bible's project. The City of Jackson did not contest this fact,¹⁸² rather, its response was that if no such land exists, then move out of town.

The Defendants-Appellants' argument that Plaintiff-Appellee had not been burdened because it could move its project elsewhere is without factual or legal merit. When advanced in similar cases, these two arguments have been rejected.

In *The Jesus Center v Farmington Hills Zoning Board of Appeals*, 215 Mich App 54; 544 NW2d 698 (1996), the church had "broadened its ministry to provide shelter service to the poor, including some who were homeless." *Id.*, p 56. When the City of Farmington Hills learned of the homeless shelter, it informed the church that it was required to get zoning approval. The church submitted an application to the Zoning Board, which subsequently conducted a hearing on the Church's request.

Individuals from the largely residential neighborhood surrounding the Church objected to the homeless shelter. Residents testified that the homeless people caused them fear, and that many were loitering, trespassing on private property and otherwise engaging in harassing behavior. Residents also stated that the homeless individuals were alcohol abusers and were seen urinating outside a local party store.

The Zoning Board denied the church's request. On appeal, the circuit court overruled the Board and found that it had violated the Religious Freedom Restoration Act (RFRA). The City of Farmington Hills appealed the decision to this Court, wherein the Court of Appeals, before turning to the merits of the issue presented, observed:

This case presents an important question of first impression for Michigan's communities and churches: To what extent may a local government, through its zoning authority, limit a church from

¹⁸² Appellants' Appendix, 380a.

undertaking, in the name of religion, activities that have a negative effect on the church's neighbors? *Id.* P 65 (emphasis added).

The City of Farmington Hills' position was that the church should move its program to another location within Farmington Hills or to another location outside of the City. The City even proposed specific locations, such as Cass Corridor. The Appellate Court held that such arguments were without merit and the proposed alternatives would further burden the *Jesus Center*:

We also conclude that the Zoning Board's decision 'substantially burden[ed]' The Jesus Center's exercise of its religious beliefs. **In defense of its decision to completely prohibit the shelter service program at The Jesus Center location, the Zoning Board argues that The Jesus Center should move the program to another location within Farmington Hills or elsewhere.** In its motion denying the use variance, the Board concluded that 'there are alternative locations for a shelter closer to where the homeless come from, such as Cass Corridor. *Id.*, p 65 (emphasis added)

The *Jesus Center* court found that a similar argument was rejected in *Western Presbyterian Church v Bd of Zoning Adjustment of District of Columbia*, 862 F Supp 538, 554 (D DC, 1994), wherein the court held:

Once the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct. Zoning boards have no role to play in telling a religious organization how it may practice its religion.

In this case, the services provided at Greater Bible's main sanctuary will be offered to the residents of Greater Bible's elderly and disabled home. Greater Bible's food program, its ministry services, educational programs, transportation services, its proximity to parks, as well as the janitorial services of the Church, mandate that the housing be located within a reasonable distance from Greater Bible. The trial court properly considered the facts in its ruling, and found

that Greater Bible would suffer a substantial burden if its project was not located near the Church's sanctuary.

In the seminal case of *Islamic Center of Mississippi v City of Starkville*, 840 F2d 293 (CA 5, 1988) *Starkville* argued that the church should build its facilities outside the City's boundaries. The Court held that *Starkville's* position would place an unconstitutional burden on members of the church due to the transportation burden on the religious group:

Regulatory statutes or ordinances that affect religious activity are constitutional so long as they impose no undue burden on the ability of the church or its members to carry out the observances of their faith. **The district court's opinion and the City's brief both suggest that application of the zoning ordinance to the Islamic Center places no burden on it or its members because they can establish a mosque within walking distance of the campus outside the city limits or buy cars and ride to more distant places within the City.** The suggestion is reminiscent of Anatole France's comment on the majestic equality of the law that forbids all men, the rich as well as the poor, to sleep under bridges, to beg in the street, and to steal bread. Laws that make churches, synagogues, and mosques accessible only to those affluent enough to travel by private automobile obviously burden the exercise of religion by the poor, a class that includes many students. **And a city may not escape the constitutional protection afforded against its actions by protesting that those who seek an activity it forbids may find it elsewhere.** By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of their religion. *Id.*, pp 298-299.

Citing *Islamic Center of Mississippi*, the court in *Sts Constantine and Helen Greek Orthodox Church v City of New Berlin*, 396 F3d 895 (CA 7, 2005), the Court ruled that a church did not need to establish that no other parcel of property existed to build its church to prove substantial burden. The Court ruled that requiring a church to continue to search for property, as the City of Jackson has done here, in and of itself was a substantial burden.

The burden here was substantial. The Church could have searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty and expense. That the burden would not be insuperable would not make it insubstantial. *Id* at 901.

Churches come in many different sizes and varieties. Most churches have missions that align themselves with each other, such as winning souls. On the other hand, others reach outside their four walls and provide shelter, food, clothing, drug rehabilitation centers, recreational centers, etc., to their communities. To accomplish their goals, churches need flexibility, visibility, and accessibility. Due to its highly controlling and discretionary nature, the Jackson City Zoning Code enables political, racial, ethnic, religious, and socio-economical considerations to determine whether churches can fulfill their mission. This is precisely what RLUIPA was intended to regulate.

Greater Bible presented uncontroverted proof to the trial court that it was unable to build its elderly and disabled housing on any piece of property other than what it owned as there simply was no additional property zoned R-3 for sale near the Church. Likewise, Greater Bible presented uncontroverted proof that it would suffer a substantial burden if the project was located outside of town, and away from Greater Bible's sanctuary. Finally, Greater Bible presented proof that building single family residential homes would place an economic burden on Greater Bible, and substantially limit its ability to further the Church's mission. The trial court correctly determined that Greater Bible had presented a prima facie case that the City of Jackson substantially burdened its religious exercise and the Court of Appeals was correct in affirming this decision.

III. THE CITY OF JACKSON'S ALLEGED AESTHETIC, TRAFFIC AND BLIGHT CONCERNS DO NOT AMOUNT TO A COMPELLING GOVERNMENTAL INTEREST UNDER RLUIPA SUFFICIENT TO JUSTIFY IMPOSING A SUBSTANTIAL BURDEN ON GREATER BIBLE'S RELIGIOUS EXERCISE TO FURTHER ITS RELIGIOUS MISSION, AND, EVEN IF THEY WERE, THE CITY OF JACKSON DID NOT MEET ITS BURDEN OF ESTABLISHING THAT IT UTILIZED THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT GOVERNMENTAL INTEREST

Once Greater Bible presented a prima facie case that its religious exercise was substantially burdened by the City's failure to rezone the property, the burden shifted to the City to show that it had compelling governmental interests in burdening Greater Bible, and that it took the least restrictive means to further these interests. Section 2(b) of RLUIPA provides the following:

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 (i.e. substantial burden), the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) of government practice that is challenged by the claim substantially burdens the Plaintiff's exercise of religion.

The City of Jackson contends that zoning laws in and of themselves, traffic concerns, aesthetic concerns and potential blight are compelling government interests. Essentially, however, only imminent "health and safety" concerns create a compelling interest. The question before the trial court was whether the City's concerns were imminent, legitimate and rose to the level of compelling governmental interests. After two days of testimony the trial court ruled that they did not.

In the free-exercise/zoning context, various courts have affirmed how substantial a government's "compelling interest" burden is. In *The Holy Spirit Association for the Unification of World Christianity v Rosenfeld*, 458 NYS2d 920, 926 91 AD2d 190 (1983), the court held:

A religious use [of land] may not be prohibited merely because of potential traffic congestion, an adverse effect upon property values, the loss of potential tax revenue, or failure to demonstrate that a more suitable location could not be foundA distinction must be drawn between danger to the public and mere public inconvenience. (Internal citations ommited.)

Other cases have reached the same conclusion. In *Covenant Community Church Inc v Town of Gates Zoning Bd of Appeals*, 444 NYS2d 415, 418-19; 111 Misc 2d 537 (1981) for example, the Court held that “factors such as the built-up nature of a residential district, adverse effect upon property values, potential tax revenue, decreased enjoyments of neighboring property, and traffic hazards, cannot justify such exclusion.” Likewise, in *Chicago v Mard* at 25 Ill 2d 60, 71-72; 182 NE2d 716 (1962), the court held that:

... the right of freedom of religion, and other first amendment freedoms, rise above mere property rights. They rise ‘far above public inconvenience, annoyance or unrest’ It is apparent that churches at any locations will add to traffic and parking congestion during hours of worship. However, there is no evidence before us to show any danger of a traffic or parking problem that would justify this particular use of the police power to limit the right of freedom of worship.

Courts in other states have found that restricting the expansion of churches in residential districts does not promote health and safety. In the case of *City of Sherman v Sims*; 143 Tex 115, 119; 183 SW2d 415 (1994) the Supreme Court of Texas ruled:

With this conclusion all the available authorities seem to agree. It must not be overlooked that the power to establish zones is a police power and its exercise cannot be extended beyond the accomplishment of purposes rightly within the scope of that power. To exclude churches from residential districts does not promote the health, the safety, the morals or the general welfare of the community, and to relegate them to business and manufacturing districts could conceivably result in imposing a burden upon the free right to worship and, in some instances, in prohibiting altogether the exercise of that right. An ordinance fraught with that danger will not be enforced.

In the similar case of *High St United Methodist Church v City of Binghamton*, 715 NYS2d 279; 186 Misc 2d 159 (2000), a New York court ruled that the denial of a special use permit for a church parking lot was subject to strict scrutiny:

[A] proposal for the establishment or expansion of a religious use-which encompasses not only buildings designed for worship, but also ancillary and accessory uses such as schools, playgrounds, related housing, and parking lots may be rejected, on zoning grounds, only if it is found that the proposed change “will have a direct and immediate adverse effect upon the health, safety or welfare of the community.” (Internal Citations omitted.)

In the case at bar, the City of Jackson’s primary concern of the potential “destruction of the neighborhood” is an irrational and unsupportable motivation that has been rejected by courts on numerous occasions. In *Western Presbyterian Church v Bd of Zoning Adjustment of District of Columbia*, 849 F Supp 77, 79 (D DC, 1994), the court held that the religious use of land “ought not be arbitrarily restricted . . . because of the unfounded or irrational fears of certain residents.” (Emphasis added.) Likewise, the Fifth Circuit has held: “[N]egative attitudes or fears, unsubstantiated by factors properly cognizable in a zoning proceeding, are not a permissible basis . . .” *Islamic Center of Mississippi, supra* at 302.

Similarly, aesthetic, traffic and blight concerns are not “compelling” as a matter of law. Nearly every court that has examined this question agrees. In fact, in the context of a free speech decision, the Supreme Court has held that the government’s interest in protecting “traffic safety and aesthetics” cannot justify a content-based restriction on speech (which, like substantial burdens on religious exercise, requires a compelling governmental interest). *Metromedia v City of San Diego*, 453 US 490, 511-12; 101 S Ct 2882; 69 L Ed 2d 800 (1981).

Courts have clearly understood *Metromedia* to mean that “[w]hile the Supreme Court has determined that ‘safety’ and ‘aesthetics’ are ‘substantial’ interests, the Court has never determined that these interests are compelling . . .” *North Olmstead Chamber of Commerce v City of North Olmstead*, 86 F Supp 2d 755, 767 (ND Ohio, 2000).¹⁸³

As shown above, unsubstantiated fears of potential blight and destabilization, as well as unsubstantiated aesthetic and traffic concerns are not compelling governmental interests.

In this case, no one testified that Greater Bible’s project would cause blight or otherwise harm the area. The best the City could present was a claim that it “could”. The architect who testified for Greater Bible stated he had visited the area many times and that the proposed elderly housing would not have a negative impact on the area. He indicated that such projects are built to conform to the area. Likewise, the City’s own personnel testified that elderly complexes generally have a positive impact on an area. It was clear to the trial court and the Court of

¹⁸³ See also *Outdoor Systems Inc v City of Merriman* 67 F Supp 2d 1258 (D Kan, 1999) (“Nearly every court addressing the issue has held that the government interest in aesthetics and safety is insufficient to justify a durational restriction on political signs in residential districts.”); *Whitton v City of Gladstone*, 54 F3d 1400, 1408 (CA 8, 1995) (“[A] municipality’s asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling.”); *Curry v Prince George’s County* 33 F Supp 2d 447, 452 (D Md, 1999) (“Again, while recognizing aesthetics and traffic safety to be ‘significant government interests,’ none of these courts found those interest sufficiently compelling to pass the applicable strict scrutiny test.”); *McCormack v Township of Clinton*, 872 F Supp 1320, 1325 n2 (D NJ, 1994) ([N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech”); *Dimmit v City of Clearwater*, 985 F2d 1565, 1572 (11th Cir 1993) (holding, in the context of a facial over-breadth challenge, that a regulation supported by aesthetic concerns is not supported by sufficient government interest to validate content-based regulation); *Village of Schaumburg v Jeep Eagle Sales Corp*, 285 Ill App 3d 481; 676 NE2d 200 (1996) (finding that “[t]raffic safety and visual aesthetics are not the sort of compelling state interest required to justify a content-based restriction on expression”); *National Advertising Co v City of Orange*, 861 F2d 246, 249 (CA 9, 1988) (“interests in traffic safety and aesthetics, while ‘substantial,’ fell shy of ‘compelling’.”); *Loftus v Township of Lawrence Park*, 764 F Supp 354, 361 (WD Pa 1991) (“we doubt that aesthetics or residential quietude is sufficiently compelling to ever justify a content-based restriction . . . on freedom of expression”).

Appeals that any arguments the City had regarding aesthetics, traffic and blight were not imminent and real, but merely unsubstantiated possibilities.

With regard to specific traffic issues, the City likewise failed to present a compelling argument. Exhibits 2 and 3 of Plaintiff-Appellee's case were traffic studies conducted by the City of Jackson for the area around the Church. Both studies showed that the traffic count in the area was so low that traffic lights were not required. Additionally, activity at the intersection nearest to Greater Bible was such that the existing traffic light was selected to be removed and stop signs installed. The City's own official testified that traffic on the streets abutting Greater Bible's proposed project was "very low".

Even assuming the City presented compelling governmental interests with regard to traffic, aesthetics, and zoning, it failed to show the absence of available alternatives to address these concerns.¹⁸⁴ The City of Jackson was required to prove that the means it chose to implement the substantial burden it inflicted upon Greater Bible was the least restrictive on Plaintiff's religious exercise. See *Cheema v Thompson*, 67 F3d 883, 885 (CA 9, 1995). The City failed to establish that it could not achieve the furtherance of its identified interests through less restrictive means.

Although expressing concerns regarding traffic and aesthetics, the City failed to present any proof as to what action it had taken to address these issues. In *Murphy v Zoning Comm'n of New Milford*, 148 F Supp 2d 173 (D Conn, 2001), the owners of a home in a residential district wished to conduct prayer services in their home. Governmental officials advised the home owner that his residential property was not zoned for a church and that the owners would have to apply for a special use permit. The property owners applied, but were denied their application

for reasons of neighborhood aesthetics and traffic safety. The *Murphy* court rejected the argument that the town's ordinance was the least restrictive means available to further these interests. *Murphy, supra* at 189-190. The same is equally true here.

The City of Jackson next argues that an attempt at city revitalization and the benefits of open air and green spaces supports its claim that it had a compelling interest in denying Greater Bible's rezoning request. The City of Jackson points to the Michigan Land Use Leadership Council's published report regarding visions and goals for the State of Michigan. However, nothing in this report can excuse the City's failure to establish by competent, admissible evidence that it has any compelling governmental interests justifying its denial of Appellee's proposed land use. Accordingly, the results reached below should be affirmed.

IV. RLUIPA IS CONSTITUTIONAL IN ITS PROHIBITION AGAINST LAND USE REGULATIONS THAT INCORPORATE INDIVIDUALIZED ASSESSMENTS AND RESULT IN THE IMPOSITION OF A SUBSTANTIAL BURDEN UPON THE EXERCISE OF RELIGION WHERE THERE IS NO DEMONSTRATION OF A COMPELLING GOVERNMENTAL INTEREST JUSTIFYING THE IMPOSITION OF THAT BURDEN OR, WHERE SUCH A COMPELLING INTEREST IS DEMONSTRATED, THE GOVERNMENT CANNOT ESTABLISHED IT UTILITZED THE LEAST RESTRICTIVE MEANS TO FURTHER THAT INTEREST

Initially, it should be noted that the City did not raise the issue of RLUIPA's constitutionality in the lower court. Rather the City's attorney simply alluded to such a claim in his closing argument.

The Court: You're not asking me to declare it unconstitutional, are you?

Mr. Stanowski:(sp) Well, I want you to think about that Judge.¹⁸⁵

A passing reference in closing argument that the judge should "think about" the constitutionality of RLUIPA can hardly be viewed as sufficient to preserve the issue on appeal.

¹⁸⁴ i.e. the "least restrictive means" finding as required by RLUIPA.

Should this Court find that the City of Jackson has properly preserved this issue on appeal the Court must determine if the “individualized assessment” language of RLUIPA violates Section Five of the Fourteenth Amendment.

In part, RLUIPA’s constitutionality depends on Congress’s power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment of the United States Constitution. RLUIPA will be deemed constitutional only if there is a “congruence and proportionality between the injury to be prevented or remedies and means adopted to that end.”¹⁸⁶

In evaluating a statute’s constitutionality under Congress’s exercise of its Enforcement Power pursuant to Section Five of the Fourteenth Amendment, the first step is to identify with some precision the scope of the constitutional right at issue. “Preventative measures prohibiting certain types of laws may be appropriate [pursuant to Section Five] when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.”¹⁸⁷ Accordingly, a federal statute targeting local regulation subject to strict scrutiny is more likely to be constitutional than a statute targeting regulations subject to more deferential review.¹⁸⁸ RLUIPA protects the free exercise of religion by targeting only regulations subject to strict scrutiny, therefore, it is “easier for Congress to show a pattern of state constitutional violations” sufficient to justify RLUIPA’s enactment.¹⁸⁹

¹⁸⁵ Appellants’ Appendix, 70a-71a.

¹⁸⁶ *City of Boerne*, *supra* at 520.

¹⁸⁷ *City of Boerne* *supra* at 532.

¹⁸⁸ *Nev Dep’t of Human Res v Hibbs*, 538 US 721, 736 (2003).

¹⁸⁹ *Id.*, p 736.

The next step in the analysis is to identify the history and pattern of unconstitutional regulation by the states against religious groups. Contrary to the arguments of the City of Jackson, Congress compiled a substantial amount of statistical and anecdotal data demonstrating that governmental entities nationwide purposefully exclude unwanted religious groups through zoning laws that implement discretionary and subjective standards and processes. See H.R. Rep. NO. 160-219, 18-24. For instance, while religious groups account for a mere 9% of the population, they are involved in 50% of litigated case involving churches, and 34% of the reported litigation involving accessory uses at existing churches. *Id* at 20-21. RLUIPA targets regulations that allow for individualized assessments, which have been shown to violate the Free Exercise Clause. This empowers Congress to act pursuant to its Section 5 authority.

The next step in the analysis is to determine if there is a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne, supra* at 520. Unlike its predecessor, the Religious Freedom Restoration Act, RLUIPA applies solely to regulations affecting land use and prison conditions, therefore, it does not displace laws, it does not prohibit legislative actions of every description and regardless of subject matter and it does not apply to all federal and state laws.¹⁹⁰ RLUIPA is not nearly as sweeping as RFRA. RLUPA only includes remedies aimed at areas where discrimination has been most flagrant. Clearly there is a congruence and proportionality between the injury to be prevented - wide spread discrimination against churches through individualized assessments - and the remedy adopted to address that injury - strict scrutiny when those individualized

¹⁹⁰ *Id* at 532.

assessments impose a substantial burden on the free exercise of religion. RLUIPA is constitutional and the Court of appeals decision should be affirmed.

While the City of Jackson never raised the issue at the trial level, it now claims that RLUIPA is a violation of the Establishment Clause. In order to survive such a challenge a statute must satisfy a three prong test: “first the [targeted] statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not ‘foster an excessive government entanglement with religion.’” *Lemon v Kurtzman*, 403 US 602, 612-13; 91 S Ct 2105; 29 L Ed 2d 745 (1971) (internal citations omitted). RULIPA satisfies every one of these requirements.

The first inquiry under *Lemon* is whether the statute has a secular governmental purpose. The City claims that because RLUIPA addresses religion, it does not have a secular governmental purpose. Merely because RLUIPA addresses religion does not mean that its purpose is religious in nature. The secular purpose requirement does not require that the law's purpose be unrelated to religion. “[T]hat would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted.” *Corp of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v Amos*, 483 US 327, 335; 107 S Ct 2862; 97 L Ed 2d 273 (1987) (upholding exemption of religious organizations from Title VII's prohibition of religious discrimination in employment). There is nothing to indicate that wholly impermissible purposes, such as the advancement of religion, are the objective of RULIPA. See *Bowen v Kendrick*, 487 US 589, 603; 108 S Ct 2562 (1988). Moreover, the Supreme Court has upheld statutes that “alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Corp of Presiding Bishop*, 483 US at 335. RLUIPA intends a secular

legislative purpose: to protect the exercise of religion though unwarranted and substantial infringement on land uses.

The City argues next argues that RLUIPA fails the second *Lemon* prong in that it advances religion by providing benefits to religion that are not provided to secular organizations. The Supreme Court, however, has stated “the government may (and sometimes must) accommodate religious practice and...that it may do so without violating the Establishment Clause.” *Corp of the Presiding Bishop*, 483 US at 335. Contrary to the City’s position, RLUIPA does not violate the Establishment Clause just because it seeks to lift burdens on religious worship without affording corresponding protection to secular activities. *Charles v Verhagen*, 348 F3d 601 (CA 7, 2003). Compare *Walz v Tax Commission of New York*, 397 US 664; 90 S Ct 1409; 25 L Ed 2d 697 (1970) (impermissible government support of religion would include sponsorship, financial support or active involvement of the government).

Lastly, *Lemon* requires that the statute not create excessive governmental entanglement with religion. RLUIPA does not require substantial involvement by public officials in order to be effective. “The statute itself defines religious exercise, 42 USC 2000cc (5)(7)(A), and requires only that states avoid substantially burdening such exercise without a compelling justification.” *Mayweathers v Newland*, 314 F3d 1062, 1069 (CA 9, 2002). To date, not one still-valid opinion construing the constitutionality of RLUIPA has held this element to be unsatisfied.

Finally, just as the Court of Appeals did, the Supreme Court of the United States, *Cutter v Wilkinson*, 544 US 709; 125 S Ct 2113; 161 L Ed 2d 1020 (2005), held that RLUIPA does not violate the Establishment Clause. While the Court, in a footnote, indicated it was not addressing Section 2 of RLUIPA, *Cutter*, read in conjunction with other decisions by various federal circuit courts, supports the conclusion that RLUIPA does *not* violate the Establishment Clause when

applied to land use regulations. In *US v Maui County*, 298 F Supp 2d 1010 (D HI, 2003), the district court first listed many cases holding that RLUPA does not violate the Establishment Clause. It then observed:

[T]here is little reason to find differently in the land use context. The Establishment Clause arguments are essentially the same. If RLUPA does not constitute an impermissible advancement of religion for institutionalized persons as against prisons, it would not seem to do so for non-institutionalized persons as against municipalities in land use decisions. The Court therefore rules consistently with Ninth Circuit precedent in a prison context and finds that RLUPA does not violate the Establishment Clause in a land use context. *Id.*, p 1015.

The City of Jackson never raised the issue of RLUPA's constitutionality at the trial level, but if this Court nevertheless decides to entertain the issue, it should find RLUPA constitutional and affirm the decision of the Court of the Appeals.

SUMMARY AND RELIEF

Greater Bible requested a rezoning of its property from R1 to R3. In reviewing that request, the City of Jackson performed an individualized assessment of the Church's proposed use of the property, thereby triggering RLUIPA. Greater Bible established that the City of Jackson had imposed a substantial burden on its religious exercise as it could not further its religious mission to provide housing for the elderly and disabled anywhere in the municipality. The City failed to establish that its alleged aesthetic, traffic and blight concerns were a compelling governmental interest justifying a denial of the rezoning request. The City similarly failed to prove that it had employed the least restrictive means of promoting its alleged governmental interest. Accordingly, the trial court was correct in finding a violation of RLUIPA and the Court of Appeals was correct in affirming the trial court's decision. That affirmance should be left undisturbed.

Respectfully submitted by:

HUBBARD, FOX, THOMAS
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Dated: August 14, 2006

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